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No. 1155 64

In the

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED ARTISTS CORPORATION,

Appellant,

v.

CITY OF DALLAS,

Appellee.

On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas Sitting at Dallas

MOTION TO DISMISS

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the ground that it does not present a substantial federal question, or if the Court deems that there is a substantial federal question, Appellant's fourth question sought to be reviewed was not timely and properly raised.

JURISDICTION

This Appellant, United Artists Corporation, has presented four questions in its jurisdictional statement. No jurisdiction exists to review the decision of the Court of Civil Appeals

for the Fifth Supreme Judicial District of Texas, because none of the questions as presented by Appellant represents a substantial federal question. Additionally, the fourth question raised by Appellant was not timely and properly raised. The Dallas Motion Picture Classification Ordinance, both on its face and as applied to the Appellant, does not violate any rights guaranteed by the United States Constitution.

QUESTIONS PRESENTED

1. Whether the Dallas Motion Picture Classification Ordinance, which provides for a judicial determination prior to restraint, is in conflict with the First Amendment of the United States Constitution?

2. Whether the Dallas Motion Picture Classification Ordinance provides sufficiently definite standards for classifying motion pictures so as not to be in conflict with the First and Fourteenth Amendments of the United States Constitution?

3. Whether the procedure for a prompt final judicial determination provided by the Dallas Motion Picture Classification Ordinance is an adequate safeguard against constitutional infirmities?

4. Whether "VIVA MARIA," having been judicially determined as "not suitable for young persons" by both the trial Court and the Court of Civil Appeals, should be exhibited as such and in accordance with the Dallas Motion Picture Classification Ordinance?

STATUTES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States and the Dallas Motion Picture Classification Ordinance, City of Dallas Ordinance No. 11,284, Appellant's Appendix A.

STATEMENT

The Dallas Motion Picture Classification Ordinance, City of Dallas Ordinance No. 11,284 (Appellant's Appendix A Page 1), sought to be enforced in this case does not totally deny the exhibition of any motion picture to anyone. It does not prohibit the distribution of any motion picture. The Dallas Ordinance is clearly and truly a *classification* ordinance, and just as clearly and truly it is absolutely *not a censorship* ordinance. The scope of the Dallas Classification Ordinance is limited to regulating the conditions under which young people under the age of sixteen (16) years may see a motion picture which has been classified as "not suitable for young persons." If a motion picture has been so classified, it must be advertised as such, but even persons under the age of sixteen (16) may view such a motion picture if they are accompanied by their parent, guardian, husband or wife. There are no provisions in the Dallas Ordinance for totally prohibiting the exhibition or distribution of any motion picture.

This Appellant, United Artists Corporation, became a party to this litigation regarding the motion picture "VIVA MARIA" by intervention. A local Exhibitor, Interstate Cir-

cuit, Inc.,[1] had contracted with United Artists for the exhibition rights to the motion picture "VIVA MARIA." In compliance with the Dallas Motion Picture Classification Ordinance, Interstate filed a letter dated January 24, 1966, requesting the motion picture "VIVA MARIA" to be classified as "suitable for young persons." This request was considered by the Classification Board on January 25, 1966, and the Board requested a screening of this film. After viewing the film on February 7, the Board, in its open public hearing on February 9, 1966, determined the motion picture "VIVA MARIA" should be properly classified as "not suitable for young persons." Interstate was notified of the Board's action by letter dated January 9, 1966, and Interstate notified the Board of its non-acceptance of the Board's classification and its intention to exhibit said film contrary thereto by letter dated February 11, 1966. As required by this classification ordinance, on February 14, 1966, within three (3) days of the Exhibitor's notice of non-acceptance, the City of Dallas petitioned the Dallas District Court for a temporary and permanent injunction to enjoin Interstate from exhibiting and advertising the motion picture "VIVA MARIA" without classifying it as "not suitable for young person," and seeking a judicial determination as to whether or not said motion picture was in fact "not suitable for young persons." The case was set for a hearing on February 17, 1966, and the City of Dallas offered to have it heard on either a temporary or a permanent injunction. The Exhibitor, Interstate, and the Distributor, Appellant herein,

[1] Interstate Circuit, Inc., has also filed an appeal in this case, Cause No. 1109, *Interstate Circuit, Inc. v. City of Dallas* filed March 3, 1967.

refused the offer to have the case heard on a permanent injunction. This case was tried as a trial de novo and not as an appeal from an Administrative Order or Decision. The City of Dallas carried the burden of proving that the motion picture was "not suitable for young persons." Both United Artists Corporation and Interstate Circuit, Inc., filed answers and were represented in the trial of the case. After hearing the evidence and viewing the entire film, the trial Court found that the motion picture "VIVA MARIA" was in fact "not suitable for young person," and entered its judgment on February 18, 1966, enjoining both defendants from exhibiting or advertising the film contrary to that finding within the city limits of the City of Dallas.

This Appellant and Interstate both appealed the trial Court's decision in this case to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, and after the submission of briefs by all parties, the Appellate Court viewed the entire film, heard oral arguments, and rendered its judgment and written opinion on April 5, 1966, *Interstate Circuit, Inc., et al. v. City of Dallas*, 402 S.W. 2d 770, writ of error refused, no reversible error. It is from this judgment and opinion by the Court of Civil Appeals that this Appellant is appealing.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

I.

The Texas Court of Civil Appeals did not err in holding that "VIVA MARIA" should be exhibited under the classification of "not suitable for young persons."

Appellant admits that the Court of Civil Appeals recognized the required elements of obscenity enunciated by this Court in *Roth v. United States*, 354 U.S. 476; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Jacobellis v. Ohio*, 378 U.S. 184; *A Book v. Attorney General*, 383 U.S. 413. However, this Appellant fails to point out that the Court of Civil Appeals also recognized the distinction between those *censorship* cases and this *classification* case. The distinction is all important.

As this Court pointed out in the *Jacobellis* case, *supra*, the very question of *obscenity* becomes a constitutional question because if the material is obscene, it is not constitutionally protected. If it is obscene, it can be totally suppressed. The Dallas Ordinance does not deal with total suppression of any material under any circumstances. The Dallas Classification Ordinance simply provides that if certain motion pictures are found to be "not suitable for young persons," they shall be exhibited and advertised as such. The "restriction" that Appellant speaks of, amounts to requiring young persons fifteen (15) years old and under to be accompanied by their parent, guardian, husband or wife when viewing a motion picture so classified. Section 46A-4(d) of the Dallas Ordinance (Appellant's Appendix A, Page 9) provides that a young person may view a motion picture classified as "not suitable for young persons" if so accompanied.

Since the Dallas Motion Picture Classification Ordinance is not a censorship ordinance, which would totally prohibit the exhibition of motion pictures, it does not attempt to determine whether or not a motion picture is obscene. In

drafting this Classification Ordinance, the City of Dallas has attempted to follow the language and decisions of this Court. This Court pointed the way for the enactment of the Dallas Motion Picture Classification Ordinance in the *Jacobellis* case, *supra*, at page 195:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population * * * to reading only what is fit for children.' Butler v. Michigan, 352 U.S. 380, 383, 1 L. Ed. 2d 412, 414, 77 S. Ct. 524. *State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectional material to children, rather than at totally prohibiting its dissemination.*" (Emphasis ours).

This Court pointed out that liberty of speech was not an absolute right with no limitations whatever in *Kingsley Books v. Brown*, 354 U.S. 436, and again in *Times Film Corporation v. Chicago*, 365 U.S. 43, 49, this Court stated:

> "Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. * * * To this argument petitioner's only answer is that regardless of the capacity for, or extent, of such an evil, previous restraint cannot be justified. With this we cannot agree. We recognized in Burstyn, 343 U.S 495, 96 L. ed. 1098, 72 S. Ct. 777, supra, that 'capacity for evil * * * may be relevant in determining the permissible scope of community control,' at page 502, and that motion pictures were not 'necessarily subject to the precise rules governing any other particular method of expression. Each method,' we said, 'tends to present its own particular problems.' At page 503."

In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, this Court held that the State has an interest in the welfare of children and that even the family itself is not beyond regulation in the public interest. This Court pointed out in *Bantam Books v. Sullivan*, 372 U.S. 58, 70, that a system of prior restraint would be tolerated if conditions of proper "judicial superintendence" and "and almost immediate judicial determination of the validity of the restraint" were met, and these conditions have been met by the Dallas Ordinance.

II.

The Texas Court of Civil Appeals did not err in holding that the Dallas Motion Picture Classification Ordinance provides sufficiently definite standards for classification of motion pictures so as to avoid constitutional infirmities.

This Court has not required impossible standards even in obscenity cases, which deal with the total prohibition of the dissemination of the material in question, but only that there be sufficiently definite warnings measured by common understanding and practices, *United States v. Petrillo*, 332 U.S. 1, and *Roth v. United States*, supra. Again in *Beauharnais v. Illinois*, 343 U.S. 250, 264, this Court held that the law was not so "ill defined" that men acting under a statute and Judges and juries in applying it could not draw from it adequate standards to guide them. This same reasoning was

used by this Court in *American Communications Association v. Douds*, 339 U.S. 382, 412, when this Court stated:

> "* * * The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."

This Court had earlier stated in *United States v. Petrillo*, supra, at page 7:

> "* * * ; but the constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices. The Constitution requires no more."

The City of Dallas has aimed its legislation at young persons under the age of sixteen (16), and has drafted its standards for classification in accordance with the decisions of this Court.

Appellant's first two questions herein deal primarily with the standards for classifying motion pictures. In this regard, Appellant makes reference to the case of *Interstate Circuit, Inc., et al., v. City of Dallas*, 249 Fed. Supp. 19 (Northern District of Texas), which was affirmed by the United States Court of Appeals for the Fifth Circuit in *Interstate Circuit, Inc., et al. v. City of Dallas*, 366 F. 2d 590. Both cases held that the Dallas Motion Picture Classification Ordinance was constitutional, but limited the standard for classifying films to those that were obscene when viewed by an audience of young people. The lower Federal Courts did recognize the doctrine of variable obscenity;

however, the City of Dallas has filed a Petition for Writ of Certiorari, *City of Dallas v. Interstate Circuit, Inc., et al.*, Cause No. 978, requesting this Court to sustain the classification standards as set forth in the Dallas Ordinance.[2] If there be a substantial federal question as to the validity of the classification standards of the Dallas Motion Picture Classification Ordinance, that question could be properly resolved by granting the Writ of Certiorari already pending before this Court.

III.

The Texas Court of Civil Appeals did not err in holding that the Dallas Ordinance provides adequate procedural safeguards.

Appellant, United Artists Corporation, urges that since the Dallas Classification Ordinance does not provide for notice to the Distributor of motion pictures, the procedures as provided by the Ordinance are inadequate. Appellant does not assert that it did not have actual notice, but merely attempts to claim that it did not have technical notice. Notwithstanding the fact that the Dallas Ordinance is aimed at the exhibition of motion pictures and in no way speaks to the distribution of any motion picture, all of the meetings and hearings of the Dallas Motion Picture Classification Board are open public hearings and the Board's actions, concerning any motion picture, are distributed to all the

[2] Interstate Circuit, Inc. et al., a number of motion picture Exhibitors in Dallas and parties to the above referenced case decided by the United States Court of Appeals for the Fifth Circuit, also filed a Petition for Writ of Certiorari in a proceeding styled *Interstate Circuit, Inc., et al. v. City of Dallas,* Cause No. 971.

exhibitors, the local press, and any other party requesting such information.

The Distributors of motion pictures, including this Appellant, do just what the term implies—distribute motion pictures; they do not exhibit motion pictures. The Distributor, as in the present case, contracts with a local Exhibitor for the exhibition of a motion picture. Although, as a matter of practice, the Distributors of motion pictures in Dallas are kept abreast of the Classification Board's actions by their contracting partners, the Exhibitors, any Distributor may receive notice of any of the Board's actions by simply requesting it, and many have so done. Any Distributor may appear at any Board meeting or hearing and present whatever evidence and testimony it may desire.

It is abundantly clear that if the Distributor does not feel that notice to its contracting partner, the Exhibitor, is sufficient, it may rectify the situation by request.

Of course, as pointed out above, this Distributor does not contend that it received no actual notice in this case; to the contrary, since United Artists Corporation is a party to this case, it is obvious that it had notice of the Board's action concerning "VIVA MARIA."

The Dallas Motion Picture Classification Ordinance, both on its face and as applied in this case complies with the requirements as set forth by this Court in *Freedman v. State of Maryland*, 380 U.S. 51. Although the *Freedman* case dealt with the complete prohibition of the exhibition of a motion picture under the Maryland *Censorship* Statute,

as opposed to the *classification* of motion pictures under the Dallas Ordinance, the record in this case clearly reveals that a prompt judicial review was afforded the interested parties. After being notified that the Exhibitor, Interstate Circuit, Inc., did not accept the Board's classification and did not intend to comply with same, the City of Dallas, as required by the Classification Ordinance, went forward and, within one week, had a judicial determination as to whether the motion picture "VIVA MARIA" was in fact "not suitable for young persons." The City of Dallas carried the burden of proof.

Section 46A-7 of the Dallas Motion Picture Classification Ordinance, entitled "Judicial Review" (Appellant's Appendix A, Page 11), sets forth the provisions for a prompt judicial review and determination. The City of Dallas *must* comply with these provisions in order to enforce the Ordinance. The Ordinance itself provides that unless this strict timetable is complied with, the Board's classification is *suspended* (Section 46A-7(b), Appellant's Appendix A, Page 14). Either the Exhibitor gets its speedy judicial review, or it may exhibit the film without classification.

The Dallas Ordinance not only provides for a prompt judicial determination as to whether or not the motion picture is properly classified; but, in addition, the Ordinance demands that the City of Dallas cooperate with the Exhibitor in its effort to obtain a speedy appeal, if requested to do so.

Most of the cases cited by Appellant deal with *censorship legislation* and a *total suppression* of the subject matter, as

opposed to the Dallas Ordinance, which does not attempt to tamper with anyone's work product, nor his right to speak or make a motion picture, but only to classify adult entertainment as such.

Appellant's contention that the burden of challenging a classification by the Board is placed upon the Exhibitor is completely untenable. This "tremendous burden" to which Appellant makes reference is simply the requirement that the Exhibitor notify the Board that it disagrees with the Board's classification. This notice entails *no burden of proof.* If a "judicial determination" is desired, a simple notice of disagreement commands the City of Dallas to provide it. It is mandatory that the City of Dallas obtain a speedy judicial determination to prove that the motion picture in question is "not suitable for young persons." The burden of proof is squarely on the City. Is Appellant seriously contending that there should be a judicial determination on every motion picture, even when there is no disagreement?

IV.

The Texas Court of Civil Appeals did not err in affirming the decision that "VIVA MARIA" was "not suitable for young persons" and should be exhibited as such.

Appellant has misconstrued what Chief Justice Dixon was saying in his written opinion in this case. Chief Justice Dixon in citing *A Book v. Attorney General, supra,* was not attempting to apply strictly the language of that case decided

by this Court to the "VIVA MARIA" case. He certainly recognized that the "FANNY HILL" case was an obscenity case dealing with the total prohibition of the dissemination of the material.

Chief Justice Dixon did rely on the language in that case to mean that further circumstances may offset a minimum of social value if the other requisites of the obscenity test are met. He then concluded that "VIVA MARIA" should be classified as "not suitable for young persons" under the terms of the Dallas Classification Ordinance, since the Dallas Ordinance provides requirements quite different from those of censorship laws, which normally provide for the total prohibition or complete suppression of the matrial. Chief Justice Dixon did not say that "VIVA MARIA" should not be constitutionally protected under the obscenity test, but he did say that the provisions of the Dallas Classification Ordinance as applied to this motion picture did not violate constitutional rights. The "minimum of social value, if *any at all*," as mentioned by Chief Justice Dixon, should be considered in its proper perspective, that is, with relation to the classification of motion pictures as provided under the Dallas Ordinance, rather than with relation to the obscenity test under censorship cases.

APPELLANT'S FOURTH QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY AND PROPERLY RAISED

No jurisdiction exists to review the decision of the Court of Civil Appeals for the Fifth Supreme Judicial District

of Texas with regards to Appellant's fourth question dealing with whether or not "VIVA MARIA" had some social value. This Appellant asserts that the Texas Court of Civil Appeals committed error in its interpretation of *A Book v. Attorney General, supra,* and quotes from the opinion of Chief Justice Dixon at the top of page 23 of its Jurisdictional Statement.

Notwithstanding this language by the Texas Court of Civil Appeals, Appellant failed to properly assign this as error in its Motion for Rehearing to the Court of Civil Appeals. The Texas Rules of Civil Procedure require proper assignment of error in the Motion for Rehearing in the Court of Civil Appeals as a prerequisite to appeal to the Supreme Court of Texas by Application for Writ of Error. Texas Rules of Civil Procedure, Rule 469(c).[3]

[3] Texas Rules of Civil Procedure—Rule 469
Requisites of Application for Writ of Error.

"The fact that the docket of the Supreme Court is overcrowded makes it imperative that applications for writs of error be as brief as possible. The attorneys are urged to cooperate with the Court in this respect, in order to reduce the work of the Court. The respondent is urged to file a reply.

"The application for writ of error shall be addressed to 'The Supreme Court of Texas,' and shall state the name of the party or parties applying for the writ. The parties shall be designated as 'Petitioner' and 'Respondent'. The application shall contain the following:

* * *

"(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court."

In its Application for Writ of Error submitted to the Supreme Court of Texas, Appellant again failed to assign error to that portion of the Court of Civil Appeals' Opinion of which it is now complaining. Thus, the Appellant has failed to properly perfect its appeal under the Texas Rules of Civil Procedure, *Moore v. Dilworth*, 179 S.W. 2d 940; *East Texas Motor Freight Lines v. Loftis*, 223 S.W. 2d 613.

Not only is Appellant required to timely assert the federal question, but it is also required to pursue it throughout the litigation in all steps of appeal. It is not proper to present it to the Highest State Court for the first time on a Petition for Rehearing. *Hanson v. Denckla*, 357 U.S. 235; *Herndon v. Georgia*, 295 U.S. 441; *American Surety Co. v. Baldwin*, 287 U.S. 156; *Forbes v. State Council*, 216 U.S. 396; *Simmerman v. Nebraska*, 116 U.S. 54.

CONCLUSION

The decision of the Texas Court of Appeals as set forth in Appendix C, Pages C-1 through C-21, of Appellant's Jurisdictional Statement, which was in effect affirmed by the Supreme Court of Texas by that Court's denial of Appellant's Application for Writ of Error, is in all respects correct, and upon that opinion and for the foregoing reasons, Appellant's appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Motion to Dismiss has been served upon Mr. Dan McElroy and Mr. Paul Carrington, attorneys for Appellant-Intervenor, United Artists Corporation, by delivering the same to them in their offices located at 1900 Mercantile Dallas Building, Dallas, Texas, and Mr. Grover Hartt, Jr., and Mr. Edwin Tobolowsky, attorneys for Appellant, Interstate Circuit, Inc., by delivering the same to them at their offices located at 3525 Southland Center, Dallas, Texas.

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